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Niels Blokker

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NATO AS AN INTERNATIONAL ORGANIZATION: TEN BRIEF OBSERVATIONS

*Niels Blokker**

1. In recent years, the NATO legal community has become more outward looking, as reflected in the NATO legal conferences, courses at the NATO Defense College in Rome and the NATO School in Oberammergau (Germany), the NATO Legal Gazette, and also in the participation of NATO lawyers in major international law gatherings.¹ NATO legal advisers and SHAPE lawyers have made important contributions in this respect.

This intensified external orientation is necessary for two main reasons, the “input reason” and the “output reason.” First: it informs the outside legal world better about NATO and NATO legal issues. Second: NATO is better informed about the output of the outside legal world—many new developments in international law are relevant for NATO and the NATO legal community must be aware of these developments. In a way, members of the NATO legal community are “NATO legal ambassadors.” They are the legal eyes, ears, and mouths of NATO in the wider community of international lawyers. Oscar Schachter has referred to this epistemic community as the “invisible college of international lawyers.”²

2. One area within public international law in which important new developments have taken place over the last few decades is in the law of international organizations. It is obvious that new developments in this area are important for NATO, since NATO is an international organization. While it is always emphasized that NATO is a political and military alliance, NATO is also an international organization. Therefore, a number of general characteristics, legal issues etc., that apply to—or are relevant for—international organizations in general, apply also to—or are also relevant for—NATO. If this is further analyzed, it may clarify legal opportunities and limitations for NATO.

* Professor of International Institutional Law (Schermers Chair), Grotius Centre for International Legal Studies, Leiden University, The Netherlands. The following article is a slightly elaborated version of the author’s oral remarks at the SHAPE workshop. See Niels Blokker, Oral Remarks at SHAPE Workshop: Tackling 21st Century Challenges Faced by International Organizations (May 6, 2015).

¹ See *NATO Defense College*, NORTH ATLANTIC TREATY ORG., <http://www.ndc.nato.int>; *NATO School Oberammergau*, NATO SCHOOL, <https://www.natoschool.nato.int>; *The NATO Legal Gazette*, NORTH ATLANTIC TREATY ORG., <https://www.act.nato.int/publications-lg> (last visited July 14, 2019);

² Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217, 217 (1977).

3. In looking at NATO as an international organization, it is necessary to take a dynamic perspective. First of all, this is necessary because NATO has changed fundamentally since it was created seventy years ago.³ However, international organizations have also changed fundamentally. Paragraphs 4 and 5 will briefly elaborate these two elements.

4. NATO has changed fundamentally following its creation in 1949 as a collective self-defense organization.⁴ At the time, it was given a very thin institutional structure. Article 9 of the North Atlantic Treaty established the Council, instructed the Council to “establish immediately a defence committee,” and empowered the Council to set up other subsidiary bodies.⁵ The North Atlantic Treaty did not provide for the creation of a Secretariat and a Secretary-General.⁶ It is difficult to believe that it has been possible to develop NATO into the complex military and political organization that it is today, without any amendments to its founding instrument. Today, NATO is much more than a collective self-defense organization, as it is carrying out a number of “crisis management”—out of area—operations.⁷ Membership has expanded, and the organization now has fully-fledged institutional structures.

5. At the same time, NATO is not unique in this. Most international organizations have changed fundamentally during their existence. In order to be able to perform their functions, international organizations themselves need to change, to adapt to the changing international milieu. During the April 2015 annual meeting of the American Society of International Law, one of the panels discussed the question to what extent international organizations are capable of adapting to change.⁸ The answer given by all panelists was that in their experience international organizations are very well able to do so.⁹ There are different legal techniques that make this possible, many more than only the formal amendment of treaties: implied powers, the notions of practice of the organization and “established practice of the organization,” various methods of

³ See North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 24.

⁴ See *id.*

⁵ See *id.* art. 9.

⁶ See *id.*

⁷ *Crisis Management*, NORTH ATLANTIC TREATY ORG., (Feb. 27, 2018), https://www.nato.int/cps/en/natohq/topics_49192.htm

⁸ See *Adapting to Change: The Role of International Organizations*, AMERICAN SOCIETY OF INT'L LAW, (Apr. 10, 2015), [hereinafter *Adapting to Change: Video*] <https://www.asil.org/resources/video/2015-annual-meeting; Adapting to Change: The Role of International Organizations>, 109 AM. SOC'Y INT'L L. PROC. 277, 277–90 [hereinafter *Adapting to Change: Transcript*].

⁹ See *id.*

interpretation, the “presumption of legality” mentioned by the International Court of Justice in its 1962 Certain Expenses Advisory Opinion, etc.¹⁰ NATO is an excellent example of an international organization demonstrating that it is capable to adapt to a changing international—security—environment.

6. Over the years it has become more clear what international organizations are and what common legal characteristics they have. There is unity within diversity. It is therefore no coincidence that the International Law Commission has now been able to reach agreement on a definition of international organizations, in the context of its work on articles on the Responsibility of International Organizations (ARIO).¹¹ In addition, there is a growing body of rules and principles that are applicable to international organizations in general.

7. One sub-area that has become much more important in recent years is the external relations of international organizations. External relations are important for NATO, partly because of the rise of out of area operations since the 1990s. For the success of Operation Unified Protector in Libya in 2011, cooperation with the U.N. and with non-member states such as Qatar was important.¹² NATO currently has a well-developed network of relations with third countries and international organizations. The same is true for many other international organizations. Existing international organizations are increasingly incapable of performing their functions in isolation. Just as long-ago states could no longer perform their state functions in isolation and started to cooperate within international organizations, nowadays many international organizations can no longer fulfil their mandate by working with the members only. In addition, there is an increased need for many international organizations to involve NGOs, private enterprises and other entities in their work; cooperation with these outside entities is often necessary for achieving an organization’s objectives. This rationale for establishing partnerships is often mentioned by international organizations. Examples can be found in the area of U.N. peacekeeping and on the websites of specialized agencies such as the Food and Agriculture Organization of the United States (FAO), “eradicating hunger is a challenge that FAO cannot ... face alone” and the World Meteorological Organization (WMO), “[n]o single government or agency has the necessary resources to address all the challenges on its own.”¹³

¹⁰ Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151, 168 (July 20).

¹¹ See G.A. Res. 66/100, annex art. 2 (Dec. 9, 2011).

¹² Ivo H. Daalder & James G. Starvridis, *NATO’s Victory in Libya: The Right Way to Run an Intervention*, 91 FOREIGN AFF. 2, 2–4 (2012).

¹³ U.N. Secretary-General, *Partnering for Peace: Moving Towards Partnership Peacekeeping*, ¶ 57, U.N.

8. All these new developments, for NATO and for other international organizations, raise legal issues and challenges. Three topics will be briefly discussed below: responsibility, immunity, and accountability. First of all: responsibility of international organizations. This topic has different dimensions. One is related to the increase in cooperation between international organizations. Such cooperation is first and foremost a necessary and positive development. However, it also entails certain risks, such as what may be called the “passing of the buck problem.” If third parties—states or individuals—suffer from the cooperation between international organizations and if it is not clear who is responsible, this may in the end backfire on international organizations and their cooperation.

Another dimension is the division of responsibility between the organization and its member states. It is a key principle in the ARIIO that international organizations are responsible for their own acts: “Every internationally wrongful act of an international organization entails the international responsibility of *that organization*,” not “...of its members.”¹⁴ This fundamental rule must be taken seriously and should not be undermined. In the relationship between responsibility of international organizations and responsibility of their members, responsibility of the organization is the rule; member state responsibility is the exception. In his fourth report for the International Law Commission, Special Rapporteur Gaja, gave an overview of the relevant practice and views in literature, which led him “to the conclusion that only in exceptional cases could a State that is a member of an international organization incur responsibility for the internationally wrongful act of that organization.”¹⁵ This area of the responsibility of international organizations is an area in which there is considerable recent practice and in which the law is now developing. It is important for NATO, since its operations may lead to claims and since it should be clear to victims how such claims should be presented and how the responsibility between NATO and its members is divided.

Doc. S/2015/229 (Apr. 1, 2015) (“We have thus entered an era of “partnership peacekeeping,” ... “no single organization can effectively address increasingly complex, multifaceted peace and security challenges on its own, whether at the subregional, regional or global level. Responding to those challenges has increasingly been and must be a joint endeavor”); *Who We Are*, FAO. OF THE U.S., <http://www.fao.org/about/who-we-are/en/>; *Partnerships*, WORLD METEOROLOGICAL ORG., <https://public.wmo.int/en/our-mandate/how-we-do-it/partnerships>; Niels Blokker, *On the Nature and Future of Partnerships in the Practice of International Organizations*, 13 INT’L ORGS. L. REV. 21 (2016).

¹⁴ G.A. Res. 66/100, *supra* note 11, art. 3 (emphasis added).

¹⁵ Giorgio Gaja (Special Rapporteur on Responsibility of International Organizations), Fourth Rep. on Responsibility of International Organizations, ¶ 96, U.N. Doc. A/CN.4/564 and Add. 1–2 (Feb. 28, Apr. 12, and Apr. 20, 2006) reproduced in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 124 (2006).

9. A second important topic is the immunity of international organizations. Most organizations enjoy absolute immunity from the jurisdiction of national courts of their members, “immunity from every form of legal process.” Nevertheless, national courts have sometimes ignored these provisions, partly under the influence of case law of the European Court of Human Rights, in cases in which the complaining individual did not have any legal remedy.¹⁶ This happened in particular—although not only—in cases brought by former staff members against their organization.¹⁷ As a result, international organizations have taken their own internal complaints procedures more seriously.¹⁸ NATO is a good example. The creation of NATO’s own administrative tribunal is fully in line with international developments in this area.¹⁹ The availability of the NATO Administrative Tribunal should be taken into account by national courts, whenever it would happen that former NATO staff would bring a case against NATO before a national court, and NATO would claim immunity.

In 2013, a conference was organized at Leiden University in which academics and practitioners discussed the immunity of international organizations.²⁰ The then legal adviser of NATO, Peter Olson, also contributed to this conference.²¹ One of the important conclusions of the conference was that there is no need for a complete overhaul of the current regime of immunity rules of international organizations.²² It is true that there are sometimes violations of these rules and that there is some criticism. However, this does not seem to require a fundamental change of the existing rules. Rather here and there, some updates and adaptations are necessary, such as improved judicial protection for staff. Examples include the new NATO Administrative Tribunal and the new U.N. system of “administration of justice” or improving alternative remedies for private law disputes.²³ Another conclusion is related to the role of national

¹⁶ See generally *European Court of Human Rights*, INT’L JUSTICE RES. CENTER, <https://ijrcenter.org/european-court-of-human-rights/>.

¹⁷ See Niels Blokker, *Foreward in Special Issue: Immunity of International Organizations*, 10 INT’L ORGS. L. REV. 255 (2014) [hereinafter *Special Issue*].

¹⁸ Philippa Webb, *Should the 2004 U.N. State Immunity Convention Serve as a Model/Starting point for a Future U.N. Convention on the Immunity of International Organizations?* in *Special Issue supra* note 17 at 329, 336.

¹⁹ See *NATO Administrative Tribunal*, NORTH ATLANTIC TREATY ORGANIZATION, (June 14, 2019), https://www.nato.int/cps/en/natohq/topics_114072.htm.

²⁰ See generally *Special Issue supra* note 17.

²¹ See Peter Olson, *Immunities of International Organizations: A NATO View in Special Issue, supra* note 17 at 419.

²² See Niels Blokker & Nico Schrijver, *Afterwords in Special Issue, supra* note 17 at 601–04.

²³ See *NATO Administrative Tribunal, supra* note 19; *About the System*, ADMINISTRATION OF JUSTICE AT THE U.N.: U.N. INTERNAL JUSTICE SYSTEM, <https://www.un.org/en/internaljustice/overview/about-the->

courts. In the conference, six case studies were done dealing with the position of national courts in Austria, Belgium, Italy, the Netherlands, Switzerland, and the U.K.²⁴ It is clear that in particular the courts in Belgium and Italy at times have been reluctant to accept the immunity of international organizations.²⁵ But overall, the conclusion seemed to be that national courts in most cases respect this immunity.²⁶ At the same time, it has been recognized that in some cases, national court judgments have performed a useful function as a sort of “wake up call,” when international organizations did not or only minimally provided for alternative remedies and where claimants would otherwise have left empty-handed.²⁷

10. Finally, there is the broad, overarching topic of accountability of international organizations, which is not unrelated to responsibility and immunity of international organizations, as discussed *supra*. This is a popular topic; it is not easy to find conferences about international organizations which do not discuss issues related to the accountability of international organizations. Nevertheless, it is more than that. This topic started to receive more attention since the 1990s, when international organizations became more active than before and the awareness increased that their activities affect more and more our daily life, directly or indirectly. This process started earlier, but it intensified beginning in the 1990s, and when it was more recognized as a fundamental development. If we look at this development from the perspective of individuals, it is not difficult to understand why “the accountability of international organizations” has become a hotly debated topic. For the individual, it does not make a difference if his or her rights are affected or violated by a state or by an international organization.

International organizations perform a great variety of activities, which may affect third parties. This is necessary and inevitable. Unfortunately, sometimes

system.shtml.

²⁴ See Kristen Schmalenbach, *Austrian Courts and the Immunity of International Organizations in Special Issue*, *supra* note 17 at 446–63; Eric de Brabandere, *Belgian Courts and the Immunity of International Organizations in Special Issue*, *supra* note 17 at 464–504; Beatrix Bonafe, *Italian Courts and the Immunity of International Organizations in Special Issue*, *supra* note 17 at 505–37; Thomas Henquet, *The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg in Special Issue*, *supra* note 17 at 538–71; Chanaka Wickremasinghe, *The Immunity of International Organizations in the United Kingdom in Special Issue*, *supra* note 17 at 434–45.

²⁵ See Eric de Brabandere, *supra* note 24; Beatrix Bonafe, *supra* note 24.

²⁶ See generally *Special Issue supra* note 17.

²⁷ See generally Niels Blokker, *Foreward in Special Issue, supra* note 17, at 255–57; Kirsten Schmalenbach, *supra* note 24.

things go wrong. This is also inevitable. However, international organizations sometimes find it difficult to react proactively and professionally whenever things go wrong or are seen to be wrong. This is not inevitable. One example is the accusations of sexual exploitation and abuse by French soldiers in 2014 in the Central African Republic.²⁸ A Swedish U.N. staff member criticized the U.N. for not acting swiftly and disclosed a confidential U.N. report to French prosecutors.²⁹ The whistleblower was suspended and Sweden threatened to publicly blame the U.N. for how it was dealing with the situation.³⁰

All of these developments contribute to a climate that is more critical and sometimes negative towards international organizations. This is the opposite of the prevailing climate after World War II, when international organizations were almost seen as panaceas. At the time, whenever a new international problem was identified, the close to automatic answer was the creation of an international organization to deal with the problem.³¹ A specific recent example of such a changing attitude towards international organizations concerns the International Criminal Court (ICC). There was much enthusiasm when the ICC was established in 1998.³² After decades of dreaming and negotiating, it was possible to create a permanent international criminal court, to end impunity for the perpetrators of the most serious international crimes. However, the climate has now completely changed. There is now a lot of criticism of the ICC, and not only in Africa.³³ In my view, this criticism is not always well founded, neither in the case of the ICC nor with respect to most other international organizations. It resembles the swing of the pendulum: from unreasonable expectations in the beginning to popular criticism a few years later, sometimes because the new institution does not seem to be doing what it was created for—like the U.N. Security Council post 1945—or sometimes precisely because it is doing exactly what it was created for—like the ICC and the arrest warrant for Sudanese President Bashir.³⁴

²⁸ See *UN Whistleblower Resigns over French Peacekeeper "Child Abuse,"* BBC NEWS <https://www.bbc.com/news/world-africa-36481372> (last visited July 13, 2019).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Adapting to Change: Transcript supra* note 8 at 277.

³² See *Rome Statute of the International Criminal Court: Overview*, UNITED NATIONS, <http://legal.un.org/icc/general/overview.htm>.

³³ See Daniel Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 LEIDEN J. OF INT'L L. 323 (2015).

³⁴ See *Al Bashir Case*, ICC, <https://www.icc-cpi.int/darfur/albashir#2>.

These are times full of criticism of international organizations. This also affects NATO as an international organization. Criticism of NATO may sometimes be part of the more general criticism of international organizations, and there is little that NATO can do about it. Nevertheless, there may also be criticism that is “NATO specific.” NATO and its members can and should be prepared for this type of criticism. For example, operation Unified Protection in Libya in 2011 is generally seen, certainly within NATO, as a highly successful operation.³⁵ Therefore, it is perhaps understandable that many in NATO were outraged and upset when in late 2011 the Libya Inquiry Commission of the U.N. Human Rights Council sent a letter to NATO asking for information about the operation.³⁶ How could NATO violate human rights? It was carrying out this operation precisely to stop severe human rights violations in Libya. The NATO reaction was rather defensive, and the Commission of Inquiry criticized NATO for not giving all the necessary information.³⁷ However, in the current era of accountability, this became an issue in which NATO was criticized harshly for in the media.³⁸ There are other examples, such as the unfortunate bombing of a passenger train crossing a bridge in Serbia in 1999, which NATO was widely blamed for.³⁹ It is necessary to react effectively in such cases. NATO and NATO lawyers should try as much as possible to limit any “legal fallout,” or “legal collateral damage.” Additionally, NATO and NATO lawyers should do as much “legal collateral damage control” as possible. In order to be able to do so, they need the full support of NATO member states—and their legal advisers—who should be giving the necessary information, who should be actively helping to deal with criticism and claims, and who should, in short, organize within NATO an “accountability strategy.” In the long run this is in the best self-interest of NATO and its member states. I have no doubt that the intensified external orientation of the NATO legal community will be helpful in this context, as it will contribute to a better understanding within NATO of the outside legal world and to a better understanding in the outside legal world of NATO.

³⁵ See Human Rights Council, *Report of the International Commission of Inquiry on Libya*, U.N. Doc. A/HRC/19/68, annex II (Mar. 8, 2012).

³⁶ See *id.*

³⁷ See *id.* at 16–18.

³⁸ See *NATO’s Duty*, N.Y. TIMES, Mar. 29, 2012, at A26.

³⁹ See *NATO Attack on Train Kills Ten*, INDEPENDENT, <https://www.independent.co.uk/news/nato-attack-on-train-kills-ten-1086871.html>.